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PP

v.

INTHIRAN RENGANATHAN & ORS

B

HIGH COURT MALAYA, ALOR SETAR
SOFIAN ABD RAZAK JC
[CRIMINAL TRIAL NO: 45-12-2004]
10 APRIL 2007

C

CRIMINAL PROCEDURE: *Trial - Close of prosecution case - Procedure to be followed by court at conclusion of prosecution under s. 180 Criminal Procedure Code - Court to consider whether prosecution has made out a prima facie case - If no prima facie case court to order acquittal - If there is a prima facie court must call upon accused to enter on his defence - Court to undertake maximum evaluation of evidence adduced by prosecution*

D

CRIMINAL PROCEDURE: *Prosecution - Circumstantial evidence - Prima facie case - Whether established - No direct evidence - Court must be satisfied that circumstantial evidence when considered together points only to guilt of accused - Must not be capable of any other meaning*

E

CRIMINAL LAW: *Prosecution - Close of prosecution - Prima facie case - Sufficiency of proof - Murder - None of prosecution witnesses identified any accused persons as ones who had assaulted deceased - Whether prosecution had made out a prima facie case*

F

EVIDENCE: *Witness - Non calling of crucial witness - Whether detrimental - Murder - Non-calling of neurosurgeon who performed craniotomy surgery - Whether adverse inference under s. 114(g) Evidence Act 1950 could be drawn against prosecution*

G

The seven accused persons were charged with murder under s. 302 Penal Code read together with s. 149 Penal Code. SP6 Nor Azhar bin Abd Halim gave evidence that he saw three Indian youth assaulting the deceased who had already fallen down. SP6 could not identify any of the Indian youth as it was dark. SP9 Mohd Jefry bin Saidin gave evidence that he saw three Indian youth assaulting the deceased at a

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distance of about 25 meter. SP3, Dr. Mohd Suhani b. Mohd Noor gave evidence that he performed an autopsy on the deceased at the Sungai Petani Hospital and said that before performing the autopsy, he had noticed that the victim's skull had signs that a craniotomy surgery had been done. SP3 further told the court that the surgeon who performed

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the craniotomy surgery was the best person to ascertain when it happened. SP3 in his autopsy report concluded that the cause of death as being head injury due to blunt trauma.

The learned defence counsel submitted that the prosecution failed to call any witnesses who could have assisted the court in regard to the injuries sustained by the deceased and the craniotomy surgery which was performed subsequently. It was claimed that the prosecution had failed to establish the chain of causation linking to the death of the deceased to the injuries sustained. The defence took the stand that there could have been a blunder during the craniotomy surgery done on the deceased that led to his death. Further, according to the learned defence counsel, the only witness who appeared to have seen the deceased being assaulted on that night was SP9 but his evidence was extremely suspicious due to material contradictions. It was also submitted that the circumstantial evidence adduced by the prosecution fell short of linking the accused persons to the death of the deceased. As there was no identification parade held, SP9's evidence on the identity of these accused persons was based on dock identification. The exhibits tendered such as a parang and a baseball bat had no blood stains on any of them to indicate the link to the deceased's injuries. The prosecution also failed to adduce any finger print evidence. At the close of the prosecution's case, the court held that the prosecution had not made out a *prima facie* case and, consequently acquitted and discharged all the seven accused persons. The prosecution appealed against that decision.

Held (acquitting and discharging the accused persons):

(1) Section 180 of the Criminal Procedure Code (CPC) sets out the procedure to be followed by the court at the conclusion of the prosecution's case as follows: (i) when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused; (ii) if the court finds that a *prima facie* case against the accused, the court shall record an order of acquittal; and (iii) if the court finds that a *prima facie* case has been made out against the accused, the court shall call upon the accused to enter on his defence. In order to ascertain whether a *prime facie* case had been made out the court must undertake a maximum evaluation of the evidence adduced by the prosecution. (paras 34 & 35)

(2) The non-calling of the neurosurgeon who performed the craniotomy surgery was fatal to the prosecution. There were many questions which remain unanswered for example if the craniotomy surgery had not being done, would the deceased have survived despite the severe injuries. Section 114(g) of the Evidence Act 1950 should in these circumstances, have been drawn. (paras 43 & 44)

(3) None of the prosecution witnesses had identified anyone of the seven accused persons as one of three Indian youth who had assaulted the deceased. In order to implicate the accused persons with murder, the prosecution must prove that at least one or all the three Indian youth were seen assaulting the deceased in order for s. 149 Penal Code to come into effect. (paras 46 & 47)

(4) The trust of the prosecution's case was based on circumstantial evidence. There was no direct evidence pointing to the seven accused persons to that crime. In dealing with circumstantial evidence, the court must be satisfied that the evidence when considered together points only to the guilt of the accused and it must not be capable of any other meaning. The chain of evidence was so incomplete that the seven accused persons could not be responsible for the deceased's death. (paras 51, 52 & 53)

(5) The prosecution had not made out a *prima facie* case to warrant the seven or anyone of the accused persons' defence to be called. (para 56)

Case(s) referred to:
Kamis v. PP [1974] 1 LNS 59 FC ***(refd)***
PP v. Lee Hock Lai [2004] 1 CLJ 57 HC ***(refd)***
PP v. Logaraja Ratnam [2004] 8 CLJ 483 HC ***(refd)***
PP v. Looi Kow Chai [2003] 1 CLJ 734 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2005] 6 MLJ 399 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Sarjeet Singh Halban Singh & Anor [1994] 3 CLJ 95 HC ***(refd)***
PP lwn. Soo Tai Leng [2005] 7 CLJ 218 HC ***(refd)***
R v. Oliva [1965] 3 All ER 116 ***(refd)***
Raymond Turnbaull & Ors [1976] 63 Cr App R 132 ***(refd)***
Teh Lee Tong v. PP [1956] MLJ 194 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180
Evidence Act 1950, s. 114(g)
Penal Code, ss. 149, 300, 302

For the appellant - Azeezi Nordin; DPP
For the respondents - Jagdeep Singh Deo (Simon Murali with him); M/s Karpal Singh & Co

Reported by Amutha Suppayah

JUDGMENT

Sofian Abd Razak JC:

[1] The seven accused persons are charged under s. 302 Penal Code read together with s. 149 Penal Code.

The charge reads as follows:

> Bahawa kamu bersama-sama pada 22.9.2003 jam lebih kurang 12.00 hingga 12.50 pagi di belakang gerai makan Medan Selera Taman Keladi, Sungai Petani di dalam daerah Kuala Muda, di dalam Negeri Kedah Darul Aman sebagai ahli kepada satu perhimpunan haram dalam mencapai tujuan bersama telah menyebabkan kematian ke atas Mohd Feirus bin Idrus (K/P No: 800126-14-5623). Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 302 Kanun Kesiksaan dibaca bersama Seksyen 149 Kanun yang sama.

[2] Section 302 Penal Code is the penal provision for the offence of murder. The offence of murder is defined in s. 300 Penal Code which states as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder ..
>
> (a) if the act by which, are death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows is likely to cause death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must be in all probability cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

[3] The offence of murder as expounded in s. 300 Penal Code comprises the element of *actus reus and mens rea*. Both elements must exist to constitute the offence of murder.

[4] Section 302 Penal Code provided 'whoever commits murder shall be punished with death.'

Section 149 Penal Code provides:

> If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of the offence, is a member of the same assembly, is guilty of that offence.

[5] Section 149 Penal Code contains two limbs, which may be outlined as these:

First Limb:

i) The accused persons were members of an unlawful assembly;

ii) The members of the unlawful assembly had a common object; and

iii) The offence was committed in the prosecution of the common object.

Second Limb:

i) The accused persons were members of an unlawful assembly;

ii) The members of the unlawful assembly had a common object;

iii) The members of the unlawful assembly, including the accused persons knew that the offence in question is likely to be committed in prosecution of the common object; and

iv) The offence was committed in the prosecution of that object.

[6] At the close of the prosecution's case 13 witnesses were called. The evidence led by the prosecution is simple and straight forward which can be briefly stated as follows:

[7] According to SP5, Saidin bin Rashid, the owner of the stalls at No: 21 and 22 about 12.15am to 12.50am in the morning of 22 September 2003, a group of Indian youth came to the rear of stalls No: 22, 23 and 24 at Medan Selera, Taman Keladi, Sungai Petani in the district of Kuala Muda ransacking his stalls using objects such as parang, baseball bat and iron pipe. The said group of Indian youth banged the tables at the stalls and shouted 'mana Melayu, mana Melayu.' SP5 then asked the Indian youth the reasons for their unruly behaviour and pleaded with them to stop their violent behaviour. The

Indian youth refused to heed to the plea made by SP5 and in the ensuing moment SP5 heard someone shouted 'Police'. The Indian youth ran and another Indian youth challenged SP5 to a fight threw away the parang. SP5 then caught hold of the said Indian youth and handed him over to SP7 L/Kpl Hamzah Bakar who was designated a Koperal sector for Taman Keladi.

[8] SP5 later made a police report of the incident and when he came back to his stalls he saw the chairs and tables scattered and broken on the ground. According to SP5, the Indian youth who came to attack him was estimated to be about 20 people. The Indian youth who was alleged to have held the parang was identified as Samyveloo a/l Ramu, the 5th accused. SP5 further stated that he used to see the 5th accused at Taman Keladi, Sungai Petani and also other accused persons named Vinayagam a/l Shankaran, the 7th accused, Inthiran a/l Renganathan, the 1st accused.

[9] When the court break for lunch and resumed at 2.15 pm., SP5 corrected his evidence with regard to the fact that the Indian youth whom he had caught was not the 5th accused but the 1st accused. SP5 explained that it was because he was confused. SP5 also said that he could not identify the other accused persons.

[10] In cross-examination, SP5 admitted that in the police report (P9) he did not mention about the baseball bat and the iron pipe but he said he had told the police about the baseball bat and the iron pipe. SP5 further stated that he was confused regarding the identity of the Indian youth whom he had apprehended because the incident happened about two years ago and could not be sure when giving evidence in the morning.

[11] The prosecution also called SP4 to the stand to given evidence wherein SP4 stated that at about 12.00 midnight on 22 September 2003 he saw a fight at stalls No. 21 and 22. SP4 saw a group of Indian youth attacking the customers at the said stalls. SP4 remembered that the Indian youth were numbered between five or six persons. One of the Indian youth who attacked the customers at stalls No. 21 and 22 had a parang with the length of three feet. At that time SP4 was about 60 to 70 feet away from the stalls No. 21 and 22. SP4 further stated that he saw an Indian youth being detained by the policeman named L/Kpl Hamzah (SP7). SP4 had not seen this particular Indian youth before. He saw L/Kpl Hamzah retrieving a parang from the Indian youth who was arrested.

[12] During cross-examination by the learned defence counsel for the accused persons, SP4 had only assumed that the Indian youth who was arrested by the police was involved in the attack on the customers at stalls No. 21 and 22 because he saw the police handcuffed him. SP4 did not see the said Indian youth holding the parang.

[13] The evidence provided by SP6 Nor Azhar bin Abd Halim described how he saw three Indian youth, one was holding an object shinning resembling a golf club or an iron rod, assaulting the deceased who had already fallen down. The other two Indian youth were keeping an eye. The distance from where he witnessed the incident was about 20 feet. SP6 could not identify any of the Indian youth as it was dark. SP6 later said that he saw two parang, one was curve and the other was a normal parang.

[14] SP9 Mohd Jefry bin Saidin gave evidence that on the night of 22 September 2003 while having supper at the stalls No. 21 and 22, he saw a group of Indian youth entered the said stalls from the rear carrying a parang. He heard a commotion at the rear and went to investigate. SP9 saw a group of Indian youth with a baseball bat, parang, iron hammer and an object which resembled a rake. SP9 further stated that he saw the deceased walking home which was opposite the rear of his stalls. He saw the deceased being assaulted but could not do anything to stop the assault as the Indian youth had pointed the parang at him. SP9 also confirmed that he saw three Indian youth assaulting the deceased at a distance of about 25 meter. The lighting was not bright, blurred but later SP9 claimed that the lighting was bright because of the light at the rear of the stalls. It was lit up by a fluorescent light.

[15] During cross-examination of SP9 by the learned defence counsel for the accused persons, he again confirmed that he saw the deceased being assaulted while his father SP5 was holding one of the Indian youth. There was no mention of the three Indian youth who had assaulted the deceased. All SP9 said was he could identify the 3rd accused as holding the baseball bat, the 4th accused as the person who chased his customers and the 5th accused as the one who pointed the parang at him and also the 1st accused as the person who was apprehended by his father, SP5. The rest of the evidence also related to identifying the baseball bat, parang, rake, and a broken wood.

[16] In this case, there were two investigating officers assigned to investigate the incident. The first was SP12 C/Insp Azlan bin Abd Kadir. He said on 22 September 2003 he was asked to investigate an assault case at Medan Selera, Taman Keladi, Sungai Petani. He received the

information from L/Kpl Adnan. There was a first information report made by L/Kpl Adnan (P3). He visited the deceased at the Sungai Petani Hospital and was informed by L/Kpl Adnan that the deceased was in coma. SP12 then proceeded to inspect the place of the incident at Medan Selera, Taman Keladi, Sungai Petani. Photographs were taken by L/Kpl Roslan. At the place of the incident, he retrieved the exhibits such as chairs, tables, one long parang, one iron rod, one iron pipe, a rake, a broken stick, a rounded wood and a baseball bat. He also arrested the seven accused persons. Sketch plan and key was drawn and prepared by him. He continued his evidence and said that the deceased was found lying unconscious at the road side near the Rela Office. The items which he had retrieved were then handed over to another investigating officer SP13 ASP Lim San Aik. SP12 did not ask the 1st accused as to the cause of his injuries but had sent the 1st accused to the hospital for treatment.

[17] The evidence of SP13 ASP Lim San Aik who was the senior investigating officer for the IPD Kuala Muda confirmed taking over the conduct of the investigation into this case as there was an element of riot involved. He also confirmed that he received the items retrieved from SP12. SP13 then sent the nine envelopes containing the exhibit to the Chemist Department for analysis. Other than that SP13 also sent the clothings of the seven accused persons and blood samples belonging to the 4th, 6th, 3rd and that of the deceased. No blood samples were sent in respect of the 2nd, 5th and 7th accused persons. All these items were sent to the Chemist Department in Petaling Jaya for DNA profiling. The DNA report from the Chemist Department was negative. SP13 informed the court that ten persons were arrested following the incident. Seven persons were charged and three others were released.

[18] The other important witness who was called to testify was SP3, Dr. Mohd Suhani b. Mohd Noor. He performed an autopsy on the deceased at the Sungai Petani Hospital on 25 September 2003. He stated in evidence that the deceased did not die instantly but died three days after the incident ie, on 25 September 2003.

[19] SP3 conducted both external and internal examination on the deceased which are as follows:

Kecederaan-kecederaan luaran yang berikut didapati:

1) Suatu luka koyak yang berjahit sepanjang 3 cm. Pada kulit kepala sebelah tepi kanan, iaitu ke hadapan kesan pembedahan yang dinyatakan tadi.

2) Lebam kulit kepala sebelah atas berukuran 7 x 4 cm.

3) Lebam kulit kepala sebelah tepi kanan berukuran 4 x 3 cm berhampiran dengan kesan pembedahan.

4) Luka berkeruping di atas hidung.

5) Kesan lebam pada telinga kanan.

6) Kesan lebam pada bahagian belakang badan sebelah atas berserta kesan-kesan lebam yang memanjang antara kesan-kesan lebam yang memanjang antara 4 hingga 11 cm.

7) Dua kesan lebam memanjang yang panjangnya 11 cm dan 12 cm yang selari berbentuk seperti landasan ataupun tramp-line pada bahagian tengah belakang badan sebelah kanan.

8) Dua kesan lebam memanjang yang panjangnya 4 cm dan 6 cm dan selari seperti landasan pada bahagian belakang lengan atas sebelah kanan.

9) Luka-luka berkeruting pada buku lima tangan kanan dan pada bahagian belakang jari-jari manis tangan kanan.

Pemeriksaan dalaman pada bahagian kepala menunjukkan:

1) Pendarahan bawah kulit kepala yang teruk.

2) Kesan pembedahan craniotomy berukuran 10 x 11.5 cm. pada tepi kanan tempurung kepala, iaitu, kawasan parietal temporal dan frontal sebelah kanan. Walau bagaimanapun, tulang-tulang yang telah dikeluarkan ketika pembedahan tersebut tiada lagi untuk pemeriksaan. Pada bahagian tengkorak ada terdapat tiga keretakan yang menjalar (radiate out) daripada tepi kesan craniotomy, iaitu, satu keretakan yang menjalar ke belakang tengkorak dan seterusnya ke bahagian dasar tengkorak. Satu lagi keretakan yang menjalar ke hadapan tengkorak dan seterusnya ke dasar tengkorak bahagian hadapan. Akhirnya, keretakan yang menjalar ke dasar tengkorak sebelah kanan.

3) Terdapat pendarahan selaput otak.

4) Otak bengkak dan terherot ke kiri. Terdapat kesan lebam serta luka-luka koyak pada permukaan otak sebelah kanan. Terdapat juga pendarahan-pendarahan kecil pada tisu dalaman otak sebelah kanan. Bahagian belakang sebelah kiri otak juga lebam dan terdapat pendarahan di dalam batang otak (brain stem).

[20] SP3 was subjected to extensive cross-examination by the learned defence counsel wherein he said that before performing the autopsy, he had noticed that the victim's skull had signs that a craniotomy surgery had been done. He described that a craniotomy surgery is usually done by a well trained and experienced surgeon as the procedure involved is complicated. SP3 also said by looking at the CT Scan record regarding the craniotomy surgery it provided information when conducting the autopsy on the deceased. The CT Scan was carried out by a radiologist, Dr. Adnan Ramli at Strand Specialist Hospital, Sungai Petani as the Government Hospital in Sungai Petani does not have such facility. According to SP3, the craniotomy surgery was carried out for purposes of treatment whereas the autopsy was done to determine the cause of death. The surgeon who performed the craniotomy surgery would be able to ascertain when exactly did the injuries happen and the autopsy would be to determine the duration of the injuries. SP3 further informed the court that it was important to determine the 'pembengkakan dan pengherotan otak berlaku.' The surgeon who performed the craniotomy surgery was the best person to ascertain when it happened. SP3 also testified that the mechanism that caused the deceased to die was the increase of pressure in the cranium (the inner part of the skull). This condition (the pressure increase inside the cranium) was the result of the swelling of the brain. The swelling of the brain occurs due to response of the brain tissues to any injury or bleeding in the brain tissues or the meninges. SP3 also confirm that the post-mortem observation of injuries on a dead person who died instantly differs from that of a person who died at a later date after sustaining the injuries. Be that as it may, SP3 in his autopsy report (exh. P8) concluded that the cause of death as being head injury due to blunt trauma. When SP3 was recalled by the defence counsel with regard to whether a parang as seen in exh. P5(G) could have caused the injuries as in exhs. P6(E) & (F), he replied probably not. SP3 also agreed that another parang as seen in exh. P5(1) and (H) could not have caused the injuries as seen in exh. P6(1).

[21] The learned defence counsel for the accused persons submitted to the court at the end of the prosecution's case as follows:

> That the deceased did not meet an instantaneous death. The deceased sustained injuries on the 22nd September, 2003 and was brought to the Sungai Petani Hospital the same night. On the 23rd September, 2003, a surgical procedure known as craniotomy was conducted on the right parietal side of the head. The said operation was done between 6.05 am to 7.10 am. The deceased died on the 25th September, 2003, at 7.35 pm. The learned defence counsel further submitted it remains unclear why the deceased was subjected to this major surgery. The exact nature of the injuries sustained by the deceased has not been medically proven.

[22] The learned defence counsel further submitted that the prosecution failed to call any witnesses who could have assisted the court in regard to the injuries sustained by the deceased and the craniotomy surgery which was performed subsequently. According to the learned defence counsel, SP3's involvement was only with regard to performing the autopsy and was not in the position to confirm or verify the medical management of the deceased prior to his death.

[23] The prosecution has failed to establish the chain of causation linking to the death of the deceased on 25 September 2003 to the injuries sustained on 22 September 2003.

[24] The learned defence counsel referred to the case of *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1 at p. 5, 'it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not' (see *Teh Lee Tong v. PP* [1956] MLJ 194). That discretion, however must be exercised having regard in the interest of justice, which includes being fair to the accused (per Lord Parker CJ in *R v. Oliva* [1965] 3 All ER 116 at p. 122; and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based whether the effect of their testimony is for or against the prosecution.'

[25] No evidence was adduced in court whether any statements were recorded from the surgeon who performed the craniotomy surgery by either SP12 or SP13. Failure to record any statements from the surgeon who performed the craniotomy surgery could only invoke the presumption under s. 114(g) of the Evidence Act 1950.

[26] The learned defence counsel for the accused persons further submitted that if there were two inferences, the inference favourable to the accused persons ought to be accepted. The favourable inference was that there could have been a blunder during the craniotomy surgery done on the deceased that led to his death, (see *PP v. Mohd Radzi bin Abu Bakar* [2005] 6 MLJ at p. 399 para B).

[27] The prosecution on the other hand submitted that the death of the deceased was a result of head injuries due to blunt trauma. This was confirmed by prosecution witness SP3 who performed the autopsy on the deceased. The prosecution further submitted that the injuries sustained by the deceased on the head could have been caused by the objects as seen in the photographs exh. P5A - G. The injuries on the deceased were not consistent with the injuries sustained during a fall on a hard surface.

The Issue Of Identification

[28] The next frontal attacks made by the learned defence counsel for the accused person was on the issue of identity. According to the learned defence counsel, the only witness who appeared to have seen the deceased being assaulted on that night was SP9 but his evidence is extremely suspicious. The narrative given by SP9 in respect of the situation was in material contradiction with that of SP5, his father. SP9 said that when he went to the back of his stalls, he saw the 1st accused being apprehended by SP5. According to him, SP5 grabbed the 1st accused by his shirt and held on to him. Simultaneously, the 1st accused held a parang and waving it towards SP5. It was then he spotted the deceased walking a distant away. All of a sudden the deceased was pounded by a group of men. SP9 told SP5 that the deceased was being attacked. Then the police came and the Indian youth ran away. The 1st accused was handed to the police. SP9 and his friends went to the aid of the deceased and carried to the stall. Yet, SP5 made no mention about this in his evidence or in the police report. The learned counsel further submitted that, if the assault upon the deceased happened within the view of SP9, it would have been witnessed by SP5 as well. At least SP5 would have known about it due to being informed by his son, SP9. but no where in his evidence did SP5 mention that his son informed him of the assault on the deceased. Whatever seen by SP5 was reflected in his police report (exh. P9). Again, there was no mention about the alleged assault. This clearly shows that the dramatic event that purported to have unfolded before the eyes of SP9 never actually took place. In the light of such material contradictions, the evidence of SP9 with regard the assault on the deceased is absolutely unreliable. The prosecution cannot rely on such evidence to prove the assault on the deceased as there was no credible evidence to show what actually happened to the deceased.

[29] The learned counsel for the accused persons further submitted that the circumstantial evidence adduced by the prosecution falls short of linking the accused persons to the death of the deceased. In this case only SP9 identified more than one accused persons. Besides the 1st accused, SP9 saw the 4th and the 5th accused in the accident. As there was no identification parade held, SP9's evidence on the identity of these accused persons was based on dock identification. SP9 testified on 23 September 2005, more than two years after the incident. SP9 also had stated that the lighting was not bright because the street light was block by the tree and the distance when SP9 was alleged to have seen the three persons assaulting the deceased was about 25 meter. The lighting which SP9 said was bright was at the rear of the stall and not at the place where the deceased was alleged to have been assaulted by the three Indian youth. These accused persons were unknown to SP9.

[30] No evidence was elucidated from either SP12 or SP13 as to why no identification parade was carried out. It was further submitted by the learned counsel that the failure to hold an identification parade, though may not vitiate the trial, would give rise to the lurking suspicion that if such a parade was conducted. SP9 would not have been able to identify these accused persons. It affects the credibility of SP9 in regards the dock identification (*Public Prosecutor v. Sarjeet Singh Halban Singh & Anor* [1994] 3 CLJ 95 HC).

[31] The prosecution was alleged to have retrieved exhibits such as a parang and a baseball bat (exhs. P10 & P18 respectively) but these exhibits have no blood stains on any of them to indicate the link to the deceased's injuries. The prosecution failed to adduce any finger print evidence to suggest that the exhibits were handled by an of the accused persons. The learned counsel for the accused persons also submitted that the nature of the investigation leaves much to be desired. There was no identification parade and no finger print on the suspected weapons of the crime. There was no investigation on the cause of the fracas on that night. Neither SP12 nor SP13 could provide the court with evidence how the 1st accused had suffered injuries. SP12 did not bother to investigate or even ask the 1st accused how he was injured. The learned defence counsel in conclusion submitted that since the prosecution has failed to prove the *actus reus* of the offence of murder, it would be futile to embark any further to discuss other issues and urge the court to acquit the accused persons without their defence being called.

Submission By Prosecution

[32] The prosecution in its rebuttal submission submitted that as far as to the cause of death of the deceased, SP3 had confirmed that the deceased died due to head injuries due to blunt trauma. It has nothing to do with the craniotomy surgery done on the deceased prior to his death. The prosecution further submitted that SP9 saw a group of Indian youth at the rear of his father's stalls (SP5) but at the same time SP9 also saw the deceased being assaulted by 3 persons whom he confirmed were Indian. Based on this evidence, the conclusion by the prosecution was that the deceased died due to the injuries caused by blunt trauma on the head and it was done by the Indian youth.

The Finding Of The Court

[33] At the close of the prosecution's case, after considering the evidence and the submissions of the respective parties, I held that the prosecution had not made out a *prima facie* case and, consequently acquitted and discharged all the seven accused persons. The prosecution has now appealed against that decision.

[34] Section 180 of the Criminal Procedure Code (CPC) sets out the procedure to be followed by the court at the conclusion of the prosecution's case as follows:

1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

2) If the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.

3) If the court finds that a *prima facie* case has been made out against the accused on the offence charged, the court shall call upon the accused to enter on his defence.

[35] In order to ascertain whether a *prima facie* case had been made out the court must undertake a maximum evaluation of the evidence adduced by the prosecution.

[36] In *PP v. Lee Hock Lai* [2004] 1 CLJ 57, the court held that 'a maximum evaluation would require a 'proper and complete evaluation of all the evidence adduced to determine whether a *prima facie* case has or has not been made out. Thus, all the evidence adduced has to be scrutinized properly and this should not be just a perfunctory cursory evaluation or an exercise of skimming over the surface of the evidence only. The prosecution must make out the ingredients of the charge with the evidence adduced. If the evaluation of the evidence results in doubts in the prosecution's case at this stage of the proceedings itself it cannot be said a *prima facie* has been made out. The defence counsel ought not to be called merely to clear or clarify the doubts. The benefits of the doubt if any at the end of the prosecution's case must go to the accused.'

[37] The test formulated by the Court of Appeal in *Looi Kow Chai v. PP* [2003] 1 CLJ 734 which discussed the duty of the court at the close of prosecution case is the same test as in the case of *Lee Hock Lai (supra)*. It was re-affirmed in the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 by the Federal Court.

[38] In the present case there is no dispute that the deceased died. The question was whether the death was due to the injuries inflicted by accused persons or whether the death was caused by an intervening circumstances that is due to the surgical procedure known as craniotomy. Craniotomy is a surgical procedure which is to be done with precision involving the drilling of holes on the skull of the patient and the removal of the fragment. According to SP3 this was normally done by a neurosurgeon.

A **[39]** The learned defence counsel in his submission submitted that the neurosurgeon who performed the craniotomy procedure should have been called to dispel any lurking doubts as to the actual cause of the death of the deceased.

B **[40]** The learned deputy public prosecutor on the other hand submitted that the cause of death of the deceased was due to head injuries due to blunt trauma and not due the craniotomy surgery on the deceased.

[41] In the case of *PP v. Logaraja Ratnam* [2004] 8 CLJ 483 the learned judicial commissioner referred to the case of *Ti Chuee Hiang v.* C *Public Prosecutor (supra)* and the need to call relevant witnesses essential to the unfolding of the narrative of the prosecution case to establish proof against the accused beyond all reasonable doubt.

[42] In *PP lwn. Soo Tai Leng* [2005] 7 CLJ 218 briefly the facts revealed that the deceased was sent to the Johor Specialist Hospital for D treatment due to severe burn injuries on 21 June 2003. The deceased was treated by SP8. On 22 June 2003 the deceased was sent for further treatment at the Singapore General Hospital and died on 2 July 2003 where the post-mortem was done by SP9. The facts of the above case revealed that both the doctors who treated the deceased at the Johor E Specialist Hospital and the doctor who performed the autopsy were called as witnesses for the prosecution.

[43] I am of the view that after going through the evidence and using the maximum evaluation test, the non-calling of the neurosurgeon F surgeon who performed the craniotomy surgery was fatal to the prosecution. There were many questions which remain unanswered for example if the craniotomy surgery had not being done, would the deceased have survived despite the severe injuries.

[44] I am of the view that the calling of the neurosurgeon was of G considerable significance because it could have either corroborated SP3's evidence that the craniotomy surgery was not the cause of the deceased's death. Section 114(g) of the Evidence Act 1950 should in these circumstances, have been drawn. The failure to do so would have occasioned a miscarriage of justice.

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[45] On the issue of identification, there were material contradictions between SP5 and SP9. It was only SP9 who claimed to have seen three Indian youth assaulting the deceased when he was near to his father. SP5 did not mention at all the fact that he saw the three Indian youth assaulting the deceased. The court also took into account that the alleged I witnessing of the assault was seen by SP9 from a distance of about 25 meter and the condition of the light was poor due to the fact that

the street lights were blocked by trees. It was only at the rear of the stalls where the lights were bright. What was important was what transpired when SP9 saw the assault under poor lighting condition, (see the case of *Raymond Turnbull & Ors* [1976] 63 Cr App R 132 for guidelines). Bearing in mind that the incident happened about two years ago from the date SP9 gave evidence in court. SP9's identification was merely dock identification which was wholly unsatisfactory. This was compounded by the fact that there was no identification parade held in order for the witnesses to identify any of the seven accused persons.

[46] In the light of this evidence, where was the nexus between the three Indian youth and the seven accused persons. None of the prosecution witnesses had identified anyone of seven accused persons as one or three Indian youth who had assaulted the deceased.

[47] In order to implicate the accused persons with murder, the prosecution must have proved that at least one or all the three Indian youth were seen assaulting the deceased in order for s. 149 Penal Code to come into effect.

[48] As its stands all evidence was only circumstantial, no one knows who the three Indian youth were. The seven accused persons were arrested at random. In fact the prosecution witness SP13 told the court that ten Indian youth were arrested following the incident, three were released for no apparent reason and were not called as witnesses or offered to the defence.

[49] It was not the function of the court to travel outside the material on record for the purpose of finding the guilt or otherwise. That was the job of the investigating agency and the prosecution.

[50] The court regrets the loss of an innocent life but the court was also mindful not to send the wrong persons to the gallows:

> Section 149 creates a specific offence. A member of the assembly would be guilty of an offence committed by another member although he had no intention to commit that offence and had done no other act except his presence in the assembly and sharing its common object.

[51] The trust of the prosecution's case was based on circumstantial evidence. There was no direct evidence pointing to the seven accused persons to that crime.

[52] In dealing with circumstantial evidence, the court must be satisfied that the evidence when considered together points only to the guilt of the accused and it must not be capable of any other meaning (see *Kamis v. Public Prosecutor* [1974] 1 LNS 59).

A **[53]** The court was of the view that the chain of evidence was so incomplete that the seven accused persons could not be responsible for the deceased's death. Any inference or presumption of fact cannot be drawn based on mere conjecture where the evidence was too speculative or highly suspicious.

B **[54]** The murder weapons retrieved by the police do not have any finger print evidence or DNA report which could connect any of the accused persons to the murder.

[55] In the circumstances, any benefit of doubts that have arisen must C be given to the accused persons.

[56] In conclusion, the prosecution in my view had not made out a *prima facie* case to warrant the seven or anyone of the accused persons defence to be called. Consequently, I acquitted and discharged the accused persons.

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